(24)

No. 95-1184

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DANIEL R. GLICKMAN,
Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities, where the handlers object to the expressive content of those programs.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting free speech rights, both of individuals and of the business community. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising important First

Amendment issues. *See, e.g., City of Ladue v. Gilleo,* 114 S. Ct. 2038 (1994); *Keller v. State Bar of California,* 496 U.S. 1 (1990); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation,* ___ F.3d ___, No. 95-50160 (5th Cir., Sept. 12, 1996).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici strongly object to government efforts to compel individuals or corporations to speak against their will. *Amici* are concerned that the First Amendment standards proposed by Petitioner in this case are so lax as to permit compelled financial support of private speech based on a mere showing that the compelled support would rationally serve government policy. *Amici* believe it important for the Court to make clear that First Amendment protections against compelled speech are not so easily trammeled.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statements set forth in the briefs of Respondents.

In brief, Respondents -- a group of handlers who grow and ship California tree fruits -- are challenging federal programs that requires them to contribute financially to advertising campaigns whose content they find objectionable.

The challenged programs involve California peaches, California plums, and California nectarines. Pursuant to "marketing orders" issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (the "AMAA"), 7 U.S.C. § 601 *et seq.*, handlers (*i.e.*, shippers) of those three fruits have been required to provide funding for generic advertising campaigns for the fruits. The campaigns are designed and carried out by committees, whose members are appointed by the Secretary from among California fruit growers and handlers, all of whom compete with Respondents.[1]

Respondents object that the challenged programs are misleading and undermine their own marketing efforts. In particular, Respondents object to advertisements indicating that fruits are fungible; they contend that their produce is superior to other fruit on the market, and the advertisements thus undermine their efforts to market their produce based on its superior quality. Other objections include evidence that advertisements favor varieties of fruits handled by members of the committees, at the expense of other varieties.

Respondents contend that their First Amendment rights are violated when they are forced to fund advertisements

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[1] The marketing order for California nectarines has provided for industry-funded advertising since 1966. A second marketing order, covering both peaches and plums, provided for industry-funded advertising for plums from 1971 to 1991 and has provided for industry-funded advertising for peaches since 1976.

which they find objectionable and which force them to spend money in order to counter what they view as misleading information disseminated by the generic advertising programs. While the Secretary contends that all fruit growers and handlers benefit from the compulsory advertising campaigns, Respondents assert that they could more successfully market their products if permitted to promote them as they see fit.

In 1987 and 1988, Respondent Wileman Bros. & Elliott, Inc. ("Wileman Bros.") filed administrative petitions pursuant to 7 U.S.C. § 608c(15)(A), challenging various aspects of the marketing orders for California peaches, plums, and nectarines. Wileman Bros. subsequently began withholding the assessments it was required to pay under the marketing orders. An administrative law judge (ALJ) issued lengthy decisions siding with Wileman Bros. (and the other Respondents, who had subsequently joined the petitions); but the Department of Agriculture Judicial Officer (JO) in September 1991 reversed those decisions and upheld the marketing orders in all respects. Petition Appendix ("Pet. App.") 6a-7a.

Respondents filed this action in federal district court in California, seeking review of the JO's decision pursuant to 7 U.S.C. § 608c(15)(B). The action was consolidated with the Secretary's suits against Respondents to enforce compliance with the challenged marketing orders. Pet. App. 7a.

In January 1993, the district court granted summary judgment to the Secretary and ordered Respondents to pay past-due assessments. Pet. App. 40a-100a. With respect to the First Amendment issues before this Court, the district court purported to adopt the Third Circuit's strict standard of

review in compelled speech cases.[2] The district court held that the Secretary had met those standards, finding that the challenged advertising programs were justified by a "compelling government interest" in avoiding instability in agricultural markets and that alternatives to mandatory programs would not be "significantly less restrictive" of First Amendment rights -- because the current program entails only a "slight" interference with such rights. *Id.*

In a June 1995 decision, the U.S. Court of Appeals for the Ninth Circuit reversed with respect to First Amendment issues. Pet. App. 1a-35a. Applying this Court's test for analyzing restrictions on commercial speech (set forth in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)), the Ninth Circuit held that the peaches/plums/nectarines advertising programs flunked the final two prongs of the *Central Hudson* test: the program was found neither to "directly advance" the government's asserted interests, nor to be "narrowly tailored" to achieving those interests. Pet. App. 17a-21a.

In June 1996, the Court agreed to review the First Amendment aspects of the case. Although the Secretary asserted in the court of appeals that the mandatory advertising

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[2] The Third Circuit has held that compelled financial support of an agricultural commodity advertising program can pass First Amendment scrutiny "only if the government can demonstrate that [the program] was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *See United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Third Circuit derived its standards by examining its own and this Court's compelled speech precedents, including *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Wooley v. Maynard*, 430 U.S. 705 (1977).

programs should be reviewed under the standards established in *Central Hudson* for commercial speech restrictions, the Secretary now contends that the *Abood* line of compelled speech cases is controlling.

SUMMARY OF ARGUMENT

The First Amendment protects not only freedom of speech, but also the freedom not to speak. Those restrictions on the government's power to compel speech extend fully to government efforts to compel financial support of private organizations' speech. Yet, in his zeal to defend government efforts to compel Respondents to fund the advertising campaigns at issue here, the Secretary asks the Court to adopt a compelled-financial-support test that amounts to little more than rational-basis review.

Particularly troublesome is the Secretary's suggestion that a more relaxed standard of review should apply because the speech for which he seeks compelled support happens to be commercial speech (i.e., speech that "proposes a commercial transaction"). It makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial or noncommercial speech. Moreover, the rationale for permitting a somewhat relaxed standard of review in cases involving *regulation* of commercial speech is wholly inapplicable in the context of *compelled* speech.

The advertising programs at issue in this case, when subjected to an appropriately strict standard of First Amendment review, cannot withstand constitutional scrutiny.

The Secretary has failed to articulate any vital policy interest served by the programs, nor has he even attempted to demonstrate that the programs are narrowly tailored in order to minimize interference with First Amendment rights.

ARGUMENT

I. THIS CASE IS GOVERNED BY THE *BARNETTE* AND *ABOOD* LINE OF DECISIONS, WHICH REQUIRE VERY CLOSE SCRUTINY OF ANY GOVERNMENT EFFORT TO COMPEL SPEECH

Having argued in the Ninth Circuit that his compelled advertising programs should be judged under the *Central Hudson* test, the Secretary now asserts that the correct rule of decision derives from *Abood* and other cases in which the Court has considered government efforts to coerce support for expressive activities from unwilling speakers.

Amici agree with the Secretary that the Court ought to look for guidance from the *Abood* line of decisions. However, *amici* believe that the Secretary has mischaracterized that line of decisions. Far from providing a rubber stamp for compelled speech that is "germane" to any government "regulatory objective" deemed "important" (Petitioner's Brief at 15), *Abood* and its progeny impose an exacting measure of First Amendment scrutiny on any government effort to compel speech by individuals or business entities.

Starting with its decision in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943), which struck down a law requiring school children to recite the Pledge of Allegiance regardless of their objections to doing so, the Court has made clear that the First Amendment protects

not only freedom of speech, but also the freedom not to speak. *See also Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977)(New Hampshire may not require objecting motorists to display the state motto, "Live Free or Die," on automobile license plates).

The Court has repeatedly held that constitutional restrictions on compelled speech extend to compelled financial support of private organizations' speech. Thus, First Amendment rights are implicated by compelled support of, *e.g.*, a state bar association (*Keller v. State Bar of California*, 496 U.S. 1 (1990)), or a labor union by a public-sector employee (*Abood*, 431 U.S. at 222). The Court has never suggested that a different constitutional analysis is required depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions in order to finance speech by non-government entities (as in *Keller* and *Abood*).

Under *Abood* and its progeny, government efforts to compel financial support of the speech of private organizations is subject to exacting First Amendment scrutiny. First, the government must demonstrate that the compelled financial support serves some extremely important government interest. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991)(plurality).[3] Second, the funded activity must be

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[3] The Court has used a variety of phrases to describe the showing required of the government in demonstrating the importance of its challenged policy interest. In *Lehnert*, the Court stated that the government must show that its policy interest is "vital." *Id.* Other cases have required that the government demonstrate that its interest is "compelling." *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n. 11 (1986). *Abood* itself (continued...)

"germane" to the government interest relied upon. *Id.* Third, the compulsory funding scheme must be narrowly tailored. *Chicago Teachers Union*, 475 U.S. at 303 & n.11; *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 19 (1986)(plurality). That is, it must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

The Secretary's portrayal of *Abood* as an endorsement of compelled speech is simply inaccurate. *Abood* involved an "agency shop" arrangement between a public school board and the union representing teachers, whereby teachers who declined to join the union were required to pay the union an "agency fee" -- a fee precisely equal to the dues paid by union members. The Court held that such compelled support of a union "ha[d] an impact upon [nonunion members'] First Amendment interests" (*Abood*, 431 U.S. at 222) and was impermissible except to the extent that the compelled support directly served some very important government interest. *Id.* at 234-236. The Court ruled that one such interest was the maintenance of labor peace -- which Congress had determined was directly advanced by creation of a system under which

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[3](...continued)
was silent on the issue, instead relying without discussion on previous case law which established that "the important contribution of the union shop to the system of labor relations established by Congress" was sufficient to justify requiring employees to finance the collective bargaining activities of a union serving as the employees' exclusive bargaining representative. In any event, the precise verbal formulation of the government's burden is not of crucial significance; the important point is that the Court has imposed an extremely heavy burden on governments seeking to justify their efforts to compel speech.

employee interests would be served by an exclusive bargaining agent. *Id.* at 220-224. Since under that system, a union designated as an exclusive bargaining agent was required to represent all employees within the bargaining unit (even nonmember employees), the Court determined that the exclusive bargaining agent system would be undermined by the "free rider" problem -- the financial incentive that employees have "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" -- unless nonmembers could be required to pay for such benefits. *Id.* at 221-222.

The Court nonetheless made clear that the First Amendment prohibits a union from charging nonmembers for expressive activities *not* directly related to the union's collective bargaining functions. *Id.* at 232-237. The Court determined that nonmembers may not be required to share in the costs of the union's political contributions or of expressing the union's views on issues unrelated to its duty as exclusive bargaining representative (*id.* at 234), but it left for future cases the drawing of a precise line between union activities that constitute collective bargaining activities and those that do not. *Id.* at 236-237.[4]

Keller applied *Abood*'s compelled speech analysis in the context of mandatory dues paid to a state bar association,

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[4] That line-drawing process has been the subject of numerous subsequent federal court suits. *See, e.g., Lehnert; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). Although the courts on occasion have had difficulty in drawing the line with precision, reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining agents. *See, e.g., Lehnert*, 500 U.S. at 520-521.

finding that such dues impinge on lawyers' First Amendment rights. *Keller*, 496 U.S. at 13. The Court noted that it had previously held, in *Lathrop v. Donohue*, 367 U.S. 820 (1960), that states have a very strong interest in regulating the legal profession and improving the quality of legal services, and that in order to avoid the "free rider" problem, "[i]t is entirely appropriate" that lawyers share in the cost of such regulation -- which directly benefits lawyers by, among other things, excluding nonlawyers from the practice of law. *Id.* at 12. The Court made clear, however, that the First Amendment prohibits a state from requiring lawyers to fund expressive bar association activities not related to the bar association's function as a regulator of the legal profession. *Id.* at 15-16. As in *Abood*, the Court declined to draw a bright line between "related" activities and "unrelated" activities. *Id.* As examples of unrelated expressive activity that lawyers could not be compelled to fund, the Court listed "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," two of the activities in which the State Bar of California had engaged. *Id.* at 16.

It is important to note that the principles articulated in *Abood* and *Keller* extend to compelled funding of *any* speech or expressive activity, not simply to "political" speech.[5] For example, *Abood* provided a lengthy list of traditional union expressive activities which could have "an impact upon the[] First Amendment rights" of dissenting employees, only a few of which activities could be deemed "political" as that term is commonly used:

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[5] The Secretary appears to concede that point. *See* Petitioner's Brief at 22-23 ("unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are germane to the unions' statutory role under the labor laws").

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating a limit on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood, 431 U.S. at 222. *See also id.* at 231 ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protections."); *Lehnert*, 500 U.S. at 521-522 (plurality)("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."). As the Court made clear in *Wooley*, the First Amendment protects "the right to refrain from speaking *at all*," not simply the right to refrain from speaking on political or controversial subjects. *Wooley*, 430 U.S. at 714 (emphasis added).[6] Thus, it is no

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[6] Of course, compelled funding of activities with no expressive content does not raise First Amendment concerns. Thus, the Court held in *Ellis* and again in *Lehnert* that "union social activities" were properly chargeable to dissenters (who were free to participate in the activities) because the "communicative content" of the activities was minimal, if any. *Ellis*, 466 U.S. at 456; *Lehnert*, 500 U.S. at 529 (plurality); *id.* at 559-560 (Scalia, J., concurring in the judgment in part and dissenting in part). Accordingly, compelled funding for those considerable portions of the Secretary's marketing order activities that lack expressive content is not vulnerable to First Amendment challenge.

defense to Respondents' First Amendment objections to the advertising programs that those objections are based on aesthetic disagreements regarding the quality of fruit, rather than on hotly debated political differences.

The Secretary's portrayal of the *Barnette/Abood/Keller* line of cases is faulty not simply because of its attempts to minimize a government's burden in demonstrating that the compelled speech serves some extremely important interest. The Secretary also attempts to eliminate all consideration of the "narrow tailoring" requirement.[7] The Secretary contends that compelled financial support of the expressive activities of private parties should be upheld so long as it is "germane" to some "important regulatory objective." Petitioner's Brief at 15. Thus formulated, the Secretary's test amounts to little more than rational basis review of compelled speech. The Court's compelled speech decisions make clear that government interference with the First Amendment right not to speak is not to be treated so cavalierly.

Under the Secretary's view of compelled speech doctrine, the government would be free to compel school children to recite the Pledge of Allegiance in classrooms. Inculcating a spirit of national unity would appear to qualify as an "important regulatory objective," and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even in the middle of World War II, the Court in *Barnette* rejected a school board's argument that the spirit

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[7] As noted *supra* at 9, *Chicago Teachers Union*, *Pacific Gas & Electric*, and *Lehnert* all made crystal clear that compelled financial support of the speech of private organizations violates the First Amendment unless it is "narrowly tailored," meaning that the infringement of First Amendment rights is the minimum amount necessary to achieve the government's purpose.

of national unity fostered by recitation of the Pledge of Allegiance should override First Amendment concerns. *Barnette*, 319 U.S. at 640-641. Indeed, the Court has made clear that in the context of protected speech, any difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796-797 (1988). Just as the Court has been extremely reluctant to permit government regulation of protected speech, so too should it be extremely reluctant to permit the government to compel speech except in the rarest of circumstances. Moreover, *Pacific Gas & Electric* makes clear that corporations enjoy the same First Amendment protections against compelled speech as do individuals. *Pacific Gas & Electric*, 475 U.S. at 16.

We note in passing that the lower courts have uniformly rejected the Secretary's suggestion that the *Barnette/Abood/Keller* line of cases establishes a somewhat more relaxed standard of review than that provided under *Central Hudson* in commercial speech regulation cases. The Third Circuit in *Frame* stated that the *Abood* line of compelled speech decisions provided the rule of decision in a First Amendment challenge to a federal compulsory advertising program for beef. *Frame*, 885 F.2d at 1134. The court said that *Abood* and its progeny employ "a higher standard of scrutiny than employed in cases involving only regulation of commercial speech," such as *Central Hudson*. *Id.* The Ninth Circuit applied the *Central Hudson* test in this case and in *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429 (1993) (a First Amendment challenge to a generic almond promotion program), because: (1) it recognized that *Central*

Hudson was a less stringent test; (2) the challenged promotional programs could not survive under either the *Central Hudson* test or the *Barnette/Abood/Keller* test; and thus (3) use of the *Central Hudson* test would obviate any need to decide which of the two tests was applicable. *Cal-Almond*, 14 F.3d at 436 ("[B]ecause we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply.").

In sum, *amici* agree with the Secretary that the *Abood* line of cases provides the rule of decision in this case. But contrary to the Secretary's suggestions, *Abood* imposes an exacting standard of review on government efforts to compel financial support of private organizations' speech, a standard which (as demonstrated in Part III. *infra)* the Secretary has not come close to meeting.

II. COMPELLED SPEECH IS NOT SUBJECT TO MORE RELAXED REVIEW SIMPLY BECAUSE THE SPEECH TO BE COMPELLED IS COMMERCIAL IN NATURE

Although he concedes that *Abood* provides the rule of decision in this case, the Secretary nonetheless seeks to lessen his evidentiary burden by noting that the speech he is attempting to compel in this case is commercial in nature. The Secretary argues:

> In this case, the challenged marketing orders authorize only commercial speech designed to promote greater consumption of the products that respondents themselves offer for sale. See Pet. App. 90a; *United States v. Frame*, 885 F.2d [at 1136]. Because of commercial speech's

"subordinate position in the scale of First Amendment values," the government has broader latitude in this setting.

Petitioner's Brief at 33-34.

The Secretary's reliance on case law concerning government attempts to *suppress* commercial speech is wholly misplaced and would lead to a dangerous erosion in First Amendment protections against compelled speech. The Court's rationale for permitting a somewhat relaxed standard of review in cases involving regulation of commercial speech[8] is wholly inapplicable in the context of compelled speech.

In its recent decision striking down Rhode Island's ban on liquor price advertising, the Court reiterated the two justifications for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones"; and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1506 (1996). Neither of those two

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[8] The Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989). Fully protected speech is not transformed into commercial speech simply because it is uttered by a corporation (*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)) or that the speaker is motivated by a desire for a profit. As the Court explained in *Fox*, "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

justifications has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically further the government's interest in preventing the dissemination of false advertising. The only speech being propounded is the speech that the government is attempting to compel. In the absence of that compulsion, there would be no speech and thus no cause to worry about false advertising.

Second, there is no basis for concluding that compelled commercial speech is any hardier than other forms of compelled speech. All forms of compelled speech are extremely "hardy" since they are backed by the force of law. Nor is there any reason to suppose that compelled noncommercial speech will have any more chilling effect on voluntary speech than would compelled commercial speech; a chilling effect on voluntary speech is simply not one of the dangers of compelled speech, whether commercial or noncommercial.

Moreover, it makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial speech or noncommercial speech. Why should government entities who compel payments into a fund used to finance private speech be entitled to a lower level of First Amendment scrutiny simply because the funds ultimately are used to promote a product rather than, say, to encourage regular medical checkups?

Under the Secretary's theory, a lower level of First Amendment review would be applied to a government program requiring Amish citizens to contribute to a fund for

advertising General Motors cars than to a program requiring those same citizens to contribute to a nonprofit health-awareness program. The Amish citizens might object to being forced to promote a means of transportation which they shun, but (under the government's theory) the compelled speech on behalf of General Motors would be subjected to minimal First Amendment review because an advertisement promoting the sale of General Motors cars clearly qualifies as commercial speech. It is no answer to respond that the Amish citizens' objections are entitled to greater weight because they are deeply felt or in some sense "ideological," because such a response would enmesh the Court in the impossible task of assigning comparative weights to objections to compelled commercial speech. For example, would a Ford Motor Co. executive (who believes that Ford cars are superior to General Motors cars) have less basis than Amish citizens for objecting to being compelled to fund General Motors advertisements?

Amici submit that the Court lacks any objective method of weighing the strength of objections of those compelled to fund commercial speech. Respondents object to being compelled to fund the generic peaches/plums/nectarines advertising programs because they sincerely believe that the programs convey an erroneous message (that all brands of peaches, plums, or nectarines are the same). There can be no principled basis for distinguishing that objection from any other sincerely held "ideological" objection. Indeed, *Abood* cautioned against *any* attempt by courts to discern the basis for objections to compelled speech:

> [T]he employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.

Abood, 431 U.S. at 241. Unless the Court is prepared to rule that *all* compelled commercial speech is entitled to a lesser degree of First Amendment protection no matter how strongly felt the objections may be, there can be no basis for the Secretary's claim that the commercial nature of the speech he is attempting to compel in this case lessens Respondents' First Amendment protections.

Nor may the Secretary rely on commercial speech case law that upholds disclaimer requirements designed to eliminate potential deception in existing advertisements. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court upheld an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. at 651. But the Court has endorsed compelled disclaimer requirements *only* for the purpose of counteracting potentially misleading messages included in the advertisement; the Court has *never* imposed such requirements on individuals or businesses who have not initiated the advertisements on their own. As the Court explained in *Pacific Gas & Electric*:

> The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages

of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views.

Pacific Gas & Electric, 475 U.S. at 15 n.12. *See also Riley*, 487 U.S. at 803 (Scalia, J., concurring in part and concurring in judgment)("[T]he state can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.").

In sum, nothing in the Court's past treatment of government efforts to *regulate* commercial speech lends support to the Secretary's argument that the government should be afforded greater latitude when compelling funding of commercial speech than when compelling funding of noncommercial speech.

III. THE COMPELLED ADVERTISING PROGRAMS CANNOT BE SUSTAINED UNDER THE TEST ESTABLISHED BY *ABOOD* FOR COMPELLED FINANCIAL SUPPORT

A. The Government Has No Vital Policy Interest in Running Generic Advertising Campaigns

The Secretary's arguments in support of the mandatory California peaches/plum/nectarines advertising programs fall far short of satisfying the burden imposed by *Abood* and its progeny on governments seeking to compel financial support of private organizations' speech.

In particular, the Secretary has failed to articulate anything approaching a "vital" policy interest in maintaining the disputed advertising programs. We note that thousands of

commodities are successfully marketed in this country without the benefit of federal government-imposed advertising programs (e.g., bananas and Georgia peaches). It is difficult to understand how the advertising campaigns can be deemed "vital" when the evidence plainly indicates that such campaigns are not necessary to permit American farmers to survive. Even accepting for the sake of argument the Secretary's claims that compelled generic advertising campaigns lead to increased product sales, effectuating marginal increases in sales within a healthy industry is hardly on a par with the policy interests cited in *Abood* (preservation of labor peace by strengthening the collective bargaining process) as the bases for assessment of agency fees on dissenting employees.

The Court noted in *Abood* that prohibiting the collection of agency fees from dissenting employees -- thereby allowing them to become "free riders" -- could completely undermine the exclusive representation system upon which American labor law is based. *Abood*, 431 U.S. at 223-224. The Court held that Michigan was justified in fearing that if the exclusive representation system were undermined, "confusion and conflict . . . could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. No similar calamity is plausible if the peaches and nectarines advertising programs were ended.

Moreover, *Abood* has been explained in later decisions as based primarily on the recognition of the inequity of permitting "free riders" to refuse to bear their fair share of collective bargaining. As the Court stated in *Ellis*, "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders -- employees in the bargaining

unit on whose behalf the union was obliged to perform its statutory function, but who refused to contribute to the cost thereof." *Ellis*, 466 U.S. at 447. Despite the Secretary's claims to the contrary, no similar "free rider" problem exists in this case.

Respondents are "free riders" only in the sense that they have arguably benefitted from the federal advertising programs to which they object. But any such benefit is only incidental to the programs' professed desire to benefit the industry as a whole; the advertising committees are under no obligation to create advertising that will be of special benefit to Respondents.[9] In contrast, a union is *required* to provide particularized benefits for *each* employee within its bargaining unit, regardless whether the employee is one who objects to paying money to the union. For example, the union is required to provide fair representation to dissenting employees in any grievance proceeding they may initiate with the employer. Thus, Respondents are simply not the type of "free riders" that *Abood* had in mind. As Justice Scalia explained in *Lehnert:*

> [W]here the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that alone does not empower the state to compel the speech to be paid for. What is distinctive, however, about the "free

[9] Indeed, Respondents allege that members of the committees have promoted the interests of their varieties of fruit at the expense of other varieties.

> riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry -- indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Lehnert, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). *See also Abood*, 431 U.S. at 222 ("benefits of union representation . . . necessarily accrue to all employees").

Respondents are no more "free riders" than are rival long-distance telephone companies when AT&T encourages consumers to "reach out and touch someone" by placing a long-distance phone call. Those companies undoubtedly benefit from such advertisements, but that benefit is hardly sufficient justification for overriding their First Amendment objections to being compelled to contribute to the costs of the advertisements.

Nor may the Secretary obviate the need for demonstrating a vital policy interest in this case by pointing out that Respondents have "voluntarily chosen" to enter the peach, plum, and nectarine markets. Petitioner's Brief at 34. The Court has routinely rejected arguments that the government may condition citizens' right to participate in routine commercial activities on their willingness to relinquish First Amendment rights. For example, *Wooley* held that New Hampshire could not condition motorists' access to its highways on their relinquishment of First Amendment

objections to displaying the state motto, "Live Free or Die," on their cars. *Wooley*, 430 U.S. ar 713-715. Nor does the First Amendment permit a state to condition employment in a government job on public support of a political party; the First Amendment is violated in such cases even though the prospective employee may easily avoid the "compelled" speech by simply refusing to accept the proffered job. *Elrod v. Burns*, 427 U.S. 347 (1976).

In sum, the Secretary has failed to demonstrate a policy interest sufficiently "vital" to justify its infringement of Respondents' First Amendment rights. The interests asserted by the Secretary in support of the peaches/plums/ nectarines advertising programs do not begin to approach the level required by *Abood, Keller, et al.* to permit infringement of First Amendment protections against compelled speech.

B. The Compelled Advertising Programs Are Not Narrowly Tailored to Achieving Any Government Policy Interest

The peaches/plums/nectarines advertising programs are constitutionally defective for the additional reason that they are not narrowly tailored to achieving any of the Secretary's identified policy interests. Indeed, the Secretary's brief fails even to acknowledge the existence of a "narrow tailoring" requirement in compelled speech cases.

While *Abood* is silent on the issue of narrow tailoring,[10] more recent cases have made clear that compelled speech cannot pass constitutional muster unless it is narrowly tailored to serving the government's vital policy interests. *Lehnert*, 500 U.S. at 519 (plurality); *Chicago Teachers Union*, 475 U.S. at 303 & n.11; *Pacific Gas & Electric*, 475 U.S. at 19 (plurality). Even assuming that the Secretary has a "vital" interest in promoting increased California fruit sales, there are numerously methods by which he could do so while infringing on Respondents' First Amendment rights to a far lesser extent.

One such method was noted by the Ninth Circuit. The Secretary's interest in sales promotion could be satisfied by simply requiring each handler to spend not less than a fixed amount on promotional campaigns; the handler would then be free to decide whether to contribute his promotional funds to the current peaches/plums/nectarines advertising campaigns or to develop his own campaign. Pet. App. 20a-21a. By granting each handler a greater say in how his promotional funds would be used, such a system would impose far less of a burden on First Amendment rights while at the same time ensuring that adequate amounts are expended each year on promotional campaigns. Indeed, numerous federal agricultural promotional campaigns -- including the almond promotion program at issue in *Cal-Almond* -- provide handlers with credits for funds they spend on their own promotional

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[10] That silence can hardly be viewed as an indication that the *Abood* Court believed that there were no limits on how far a government could go in infringing First Amendment rights so long as all measures enacted were germane to its vital policy interests. Rather, the Court had no occasion to address that issue; it simply determined that some core union functions were properly chargeable to dissenting employees and that other functions not germane to those core functions were not chargeable, and it left more precise line drawing for later cases.

activities; there is no evidence in the record that such programs have proven any less effective in promoting sales than programs without a credit option.

Alternatively, the Secretary's policy interests could be achieved in a more narrowly tailored manner if the advertising programs were funded through general tax revenues. As the Supreme Court explained in *Keller*, 496 U.S. at 10-13, use of general tax revenues to disseminate a particular viewpoint does not raise First Amendment concerns. Thus by definition, an advertising program funded through general tax revenues would be far less restrictive of First Amendment rights than are the current programs -- and therefore the current programs cannot be said to be narrowly tailored to achieving the Secretary's policy interests.[11]

Speech funded through expenditure of tax revenues -- known as "government speech" -- does not infringe on the First Amendment rights of taxpayers who disagree with the message conveyed, because "[g]overnment officials are expected as part of the democratic process to represent and to espouse the views of a majority of their constituents." *Id.* at 12. Thus, Respondents would have no cause for complaint if a generic advertising program for peaches, plums, and nectarines were funded out of tax revenues. That might even be true if the government imposed a tax on growers and handlers in order to raise sufficient revenue to pay for such a program. However, the Court need not address whether the current programs qualify as "government speech," because the

[11] Moreover, given the absence of a "free rider" problem of the type present in *Abood*, there is no basis for contending that taxpayer funding fails to address the Secretary's interests in correcting the inequities arising from the presence of "free riders."

Secretary has explicitly waived reliance on that argument. Petitioner's Brief at 25 n.16.

Nor would there be any merit to a "government speech" argument in this case. The peaches/plums/nectarines advertising programs at issue here are controlled by competitors in the industry, who are responsible for planning and executing the advertising campaigns and determining assessments for handlers. In other forums, the Department of Agriculture -- in an apparent effort to avoid making its commodity promotion programs subject to the Administrative Procedure Act -- has repeatedly disclaimed a desire to exercise any direct control over the programs. *See, e.g.*, K. Clayton, "Issues Facing Domestic Commodity Research and Promotion Programs," at 4-5, in W. Armbruster and J. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation 1993). Under similar facts in *Keller*, the Court rejected an argument that speech by the State Bar of California constituted "government speech"; the Court held that an organization such as a state bar -- whose membership and leadership is limited to a small segment of the total population and whose income derives from "dues" rather than from legislative appropriations -- cannot be said to engage in "government speech" exempt from First Amendment protections against compelled speech. *Keller*, 496 U.S. at 11-13.

A third method of achieving the Secretary's policy interests in a more narrowly tailored manner would be to encourage growers and handlers to enter into voluntary cooperative promotional ventures. Voluntary cooperatives have been successfully established for numerous agricultural products. Indeed, since the Secretary's current advertising programs are premised on the theory that such programs are

in the overall best interest of growers and handlers (albeit they do not always recognize their best interests), it stands to reason that increased encouragement of voluntary cooperatives would eventually succeed in increasing the number of such cooperatives.

In sum, the Secretary's peaches/plums/nectarines advertising programs are not narrowly tailored to achieving the Secretary's policy interests. Numerous alternatives to those programs would achieve the Secretary's policy interests while infringing far less on First Amendment rights.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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